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No. 04-1107

Supreme Court, U.S.
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In The
Supreme Court of the United States

FOCUS MEDIA, INC.,

Petitioner,

vs.

NATIONAL BROADCASTING COMPANY, INC.; ABC, INC.; PAXSON COMMUNICATIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR REHEARING

SUSAN M. FREEMAN
(Counsel of Record)
LAWRENCE A. KASTEN
LEWIS AND ROCA LLP
40 N. Central Avenue
Phoenix, Arizona 85004
(602) 262-5311

Attorneys for Petitioner Focus Media, Inc.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

On April 4, 2005, the Court denied Focus Media Inc.'s Petition for Writ of Certiorari. Just over one week ago, on April 20, 2005, President Bush signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("Bankruptcy Reform Act" or "Act"), Pub. L. No. 109-8. A section of that legislation overruled the law upon which the Ninth Circuit relied below. Specifically, the Act establishes that involuntary bankruptcy petitions cannot be filed by creditors whose claims are disputed in amount, and also mandates that bankruptcy courts may not evaluate claims to split off amounts deemed undisputed to count toward the statutory claims threshold for such petitions. This section of the Act, which Congress made effective immediately and retroactive to all pending cases, compels a result different from that reached by the Ninth Circuit here. In such circumstances, this Court has frequently exercised its summary disposition power to grant a writ of certiorari, vacate the decision below, and remand for reconsideration in light of the new law. Although the Act became law after this Court denied the petition for certiorari, a timely petition for rehearing is a recognized, acceptable means of bringing new law to the Court's attention. This petition is timely, and this is a classic case for a GVR.

SUMMARY OF NATURE OF CASE AND PRIOR PROCEEDINGS

The procedural history is set forth in detail in the Petition for Certiorari. Petitioner Focus is an independent media buying company that purchased media time for resale to customers from local radio and television stations and vendors of cable television. Focus' debts to these companies for the airtime is usually uncertain and unliquidated, due to the pricing of broadcasting airtime. The value of airtime depends in large measure on the size and nature of the particular viewing audience. Focus was

billed initially on an estimated basis, but the amounts actually owed under the contracts were determined retroactively after a "post-analysis" adjustment applying Nielsen ratings to the specific channel and time of each airing. The post-analysis frequently revealed that vendors had over-estimated their billings.

A billing and payment dispute arose between NBC affiliates and Focus. In March 2000, NBC sued Focus in the United States District Court for the Central District of California, seeking a prejudgment writ of attachment under California law. The court denied that request, concluding that the amount of the claim was not "readily ascertainable," as required for issuance of the writ (App. 1).

Apparently unsatisfied, NBC enlisted the aid of ABC and Paxson (joint Respondents here), and on October 6, 2000, they filed an involuntary bankruptcy petition against Focus. Involuntary bankruptcy is, putting it mildly, a significant event in the life of a business, and typically results in its demise. Congress has, accordingly, set forth exacting standards for such petitioning creditors. The Bankruptcy Code requires that: (1) the requisite number of petitioning creditors (2) each holds a non-contingent claim against the debtor not "the subject of a bona fide dispute" and (3) that total in aggregate at least a statutory minimum amount [then $10,775]. 11 U.S.C. § 303(b)(1), (2).

Respondents recognized in the bankruptcy court that the total amounts Focus owed each of them was contested, given claimed offsets and recoupment, but argued that undisputed portions of the alleged debts exceeded the $10,775 threshold. At their request, the bankruptcy court evaluated the evidence of their claims and concluded that a sufficient core amount was due and exceeded the threshold. As a result, Focus was forced into Chapter 7 bankruptcy and its assets were sold, leaving it with a damages claim against Respondents for filing a wrongful petition. 11 U.S.C. § 303(i).

On appeal, the Ninth Circuit interpreted Bankruptcy Code § 303(b) to mean that a bankruptcy court, in determining whether a claim could be used to compel an involuntary bankruptcy, could split the claim into a disputed part and an undisputed part, and count the undisputed component toward the statutory minimum. The Ninth Circuit's essential holding, and the reason it rejected Focus' appeal and affirmed on this point, was summed up in one sentence: "We disagree with Focus' contention that an uncertainty or dispute as to amounts owed above $10,775 can create a bona fide dispute as to the entire debt." (Pet. Cert. App. A at A12-A13; 378 F.3d at 926).

Focus respectfully suggests that the Ninth Circuit erred in its interpretation of Section 303(b). It has never been Congress' intention to permit splitting of claims, using bankruptcy courts instead of state courts to determine what parts of debts are valid, and forcing a company's liquidation based on a bankruptcy judge's weighing of claims and counterclaims and recoupment defenses. Whatever doubt there may have been on that proposition prior to the enactment of the Bankruptcy Reform Act last week, there is no doubt now.

REASONS FOR GRANTING THE PETITION

A. Congress Amended Section 303 To Overrule Decisions, Such as the Ninth Circuit's Decision Below, That Have Misinterpreted the Statute to Authorize Splitting of Claims

Section 1234(a) of the Bankruptcy Reform Act amended 11 U.S.C. § 303. As amended, it now provides, in pertinent part:

> (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title –
>
> (1) by three or more entities, each of which is either a holder of a claim against such person

> that is not contingent as to liability or the subject of a bona fide dispute *as to liability or amount*, or an indenture trustee representing such a holder, if such *noncontingent undisputed* claims aggregate at least $12,300 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; . . .
>
> (h) . . . [A]fter trial, the court shall order relief against the debtor in an involuntary case . . . only if, (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute *as to liability or amount*;. . . .

(*See* App. 2 (emphasis added to show new language).)

Congress also expressly made this amendment retroactive:

> (b) EFFECTIVE DATE; APPLICATION OF AMENDMENTS – This section [1234(a)] and the amendments made by this section shall take effect on the date of the enactment of this Act and shall apply with respect to cases commenced under title 11 of the United States Code before, on, and after such date.

(App. 2.)

Congress has thus now made clear that "each" creditor attempting to force an alleged debtor involuntarily into bankruptcy must hold "a claim" that is not "the subject of a bona fide dispute as to liability *or* amount" (emphasis added). Congress' use of the disjunctive term "or," of course, is significant, and it signals the courts to give independent meaning to each word on either side of the "or." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 61 (1980); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337-39 (1979). In short, the plain language of the amendment makes clear that even where a claim is subject to a bona fide dispute *solely* as to amount, that claim may not be used by a creditor to force an alleged debtor into involuntary bankruptcy.

To reinforce the point, Congress in the next sentence of the statute made clear that only "undisputed claims" may be aggregated to reach the threshold amount. This language is flatly inconsistent with the analysis applied by the Ninth Circuit, which held that a claim that is disputed as to amount may be used to compel involuntary bankruptcy, so long as there is an undisputed portion of the claim meeting the threshold amount.

We respectfully suggest that the plain language of the statute is clear. The legislative history also confirms this reading, and, indeed, reveals that Congress' intention was exactly to overrule appellate decisions like the one below.

A Committee Report accompanying the Senate Bill that eventually became the Act explained the amendments to Section 303. "This provision amends section 303(b)(1) to specify that a creditor would be ineligible to file an involuntary petition if the creditor's claim was the subject of a bona fide dispute as to liability or amount." H.R. Rep. No. 109-31, pt. 1, at 149 (2005) (App. 3.) The Report goes on to clarify that the amendment "further provides that the claims needed to meet the monetary threshold must be undisputed." *Id.*

The Act's legislative history also includes a statement by Representative Edward Royce when the House voted on the bill. Representative Royce explained that bankruptcy court is, in Congress' view, the wrong forum for resolving disputed claims or attempting to sort out whether and what portion of a disputed claim should be regarded as undisputed.

> Section 1234 reemphasizes that a person who disputes *the amount of*, or liability for, a claim should not be disadvantaged by the stigma and expense of an involuntary bankruptcy proceeding. Put simply, the bankruptcy courts in this nation should now uniformly hold that any claim that is subject to a dispute or litigation, or if it is contested, *whether as to the amount of the claim,*

> *or as to liability for the claim*, that claim cannot be used to commence an involuntary bankruptcy case. This is the *bright line* that Congress intended to create in 1984 because involuntary bankruptcy carries with it, not only a responsibility, but the burden on behalf of petitioning creditors to be accurate and certain that their provable claims are qualified by being *without dispute as to either liability or amount* before commencing an involuntary bankruptcy case.

151 CONG. REC. E677-78 (daily ed. Apr. 18, 2005) (statement of Rep. Royce) (emphasis added) (App. 4-5.)

Representative Royce noted further that the amendments to Section 303 were made necessary by judicial decisions, like the Ninth Circuit's decision below, that permitted "splitting" of claims into disputed and non-disputed components:

> It is incomprehensible that an involuntary bankruptcy petition could be based on claims that are inaccurate as to either liability or amount; the injustice that would result from such a filing is so manifest. Despite this manifest injustice of national significance, judges continue to condone the filing of involuntary petitions brought by creditors using disputed claims. For this reason, section 1234 was made a necessary part of this legislation.
>
> * * *
>
> This clarification is necessary because the intent of Congress has been blurred by judicial decisions that go so far as to split disputed claims into "disputed" and "undisputed" parts, or to describe disputes as "potential disputes." These decisions are wrong and the damage they have caused to the victims of involuntary bankruptcy cases brought using such claims is incalculable.

Id. at E677-78 (App. 5-6.)

It is unclear from the legislative history whether Representative Royce was specifically referring to the Ninth Circuit's decision below, or the previous holding on which it relied, *Chicago Title Ins. Co. v. Seko Invs., Inc. (In re Seko Invs., Inc.)*, 156 F.3d 1005 (9th Cir. 1998). His comments, however, establish that Congress intended to overrule the rationale of these decisions and, effective immediately to pending cases, prohibit claim "splitting" analysis like that applied by the Ninth Circuit to affirm Focus' involuntary bankruptcy.

B. An Amendment To a Controlling Federal Statute Is a Quintessential Occasion for a GVR

This Court has entered orders to grant, vacate, and remand – a practice commonly referred to by the acronym "GVR" – in a wide variety of circumstances in which a new development might reasonably be expected to cause a lower court to reconsider its prior ruling. *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (collecting cases); *see generally* R. Stern, et al., SUPREME COURT PRACTICE § 5.12(b), at 317 (8th ed. 2000). One such common new development warranting a GVR is the passage of a new statute. *E.g.*, *Bureau of Economic Analysis, United States Dep't of Commerce v. Long*, 454 U.S. 934 (1981); *Sioux Tribe of Indians v. United States*, 329 U.S. 685 (1946); *cf. Chater*, 516 U.S. 163 (GVR for reconsideration in light of new agency interpretation of federal statute); *Omaha Nat'l Bank v. Nebraskans for Independent Banking*, 426 U.S. 310, 310-11 (1976) (GVR for reconsideration in light of new state statute that could have "substantial bearing" on the outcome of the case).

This Court discussed GVR practice at length in *Lawrence v. Chater*, 516 U.S. 163. The Court held that "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further

consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate." *Id.* at 167. Whether such an order ultimately ought to issue, the Court concluded, "depends further on the equities of the case." *Id.* at 167-68. Specifically, the Court found the equities might not favor a GVR order if the petitioner was using the request as "part of an unfair or manipulative litigation strategy," or if the benefits of a GVR appeared minimal. *Id.*[1]

The Court's analysis in *Chater* establishes that the ordinary factors for determining whether to grant a writ of certiorari do not apply to the decision whether to enter a GVR order. *See id.* at 174; *see also Thomas*, 519 U.S. at 914 (Scalia, J., concurring). The GVR procedure conserves the resources of the Court, "assists the court below by flagging a particular issue that it does not appear to have fully considered," assists this Court by "procuring the benefit of the lower court's insight," and alleviates the "potential for unequal treatment that is inherent in [this Court's] inability to grant plenary review of all pending cases. . . . " *Chater*, 516 U.S. at 167 (internal quotation omitted).

This is a classic case for a GVR. In the Bankruptcy Reform Act, Congress overruled judicial interpretations of Bankruptcy Code § 303 that permit bankruptcy courts to displace state court resolution of amounts due and force a business into liquidation whenever the bankruptcy judge concludes a sufficient amount is not legitimately disputed.

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[1] Justice Scalia dissented from the Court's opinion in *Chater*, suggesting a greater degree of certainty of error below should be necessary for a GVR. 516 U.S. at 177 (Scalia, J., dissenting). In a subsequent opinion, however, Justice Scalia indicated that he would find the GVR practice appropriate where, as here, a new development of controlling law "appears to contradict" the lower court's decision. *Thomas v. American Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring).

Under the Act, there is not merely a "reasonable probability" that the Ninth Circuit would reconsider its analysis, but a compulsion to do so.[2]

The equities also favor a GVR order. Focus is not seeking a GVR for purposes of delay or otherwise to manipulate the judicial process. The Act on which it relies became law just nine days ago. As noted, Congress expressly made section 1234 retroactive to benefit parties in Focus' position.

C. A Timely Petition for Rehearing Is a Proper Procedural Mechanism To Bring a Change In Law To the Court's Attention

Focus filed its petition for writ of certiorari before the change in the law. The Court denied the petition for writ of certiorari on April 4, 2005. This petition is timely under Rule 44.2. The enactment, after a petition for writ of certiorari has been denied, of "new legislation that has a substantial or controlling effect upon the case" is a sufficient "intervening circumstance" to justify a timely petition for rehearing. *See* Stern, *supra*, § 15.6(b), at 731 (citing *Massey v. United States*, 291 U.S. 608 (1934) and *Sioux Tribe*, 329 U.S. at 685).

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[2] Although the Ninth Circuit indicated that it accepted, as a matter of fact, that there was no bona fide dispute on the claims (Pet. Cert. App. A. at 12), that discussion was plainly premised on its later determination that a counterclaim or claim for recoupment could not create a genuine dispute as a matter of law if it did not reduce the alleged liability below the statutory threshold amount. (*Id.* at 12-14.) The Ninth Circuit is all but certain to reconsider that analysis in light of the amendment to section 303.

CONCLUSION

This Court should grant the petition, vacate the decision below, and remand for reconsideration in light of section 1234 of the Bankruptcy Reform Act.

Respectfully submitted, this 29th day of April, 2005.

LEWIS AND ROCA LLP

SUSAN M. FREEMAN
(Counsel of Record)
LAWRENCE A. KASTEN

Counsel for Petitioner
Focus Media, Inc.

CERTIFICATE OF COUNSEL

Undersigned counsel certifies that this Petition for Review is restricted to the grounds specified in this Court's Rule 44.2 and that it is presented in good faith and not for delay.

SUSAN M. FREEMAN
(Counsel of Record)

Minute Entry of United States District Court for the Central District of California (Apr. 26, 2000).

PROCEEDINGS: (IN CHAMBERS)

Plaintiff's Application for Writ of Attachment is DENIED. Two Superior Court judges have separately asserted jurisdiction over Sears' and Universal's funds owed to media outlets, and have issued substantial and precise orders over the funds. Although the ultimate determination of the potentially dispositive legal issue of *Colorado River* abstention is properly left for Judge Marshall, at this juncture the magistrate judge will refrain from issuing an order conflicting with those already issued by the Superior Court.

Although this court rules based on the reasoning of the foregoing paragraph, the court has spent considerable time analyzing the parties' respective positions, following oral argument and review of the Supplemental pleadings of the parties. Accordingly, the court alternatively finds that NBC has failed to show that the amount sought to be attached is readily ascertainable. Difficult questions exist in ascertaining the amount of the claim. NBC's claims against Focus Media, while clearly substantial in amount, and certainly, not frivolous, nonetheless are not susceptible to a clear-cut application of California's Attachment statute.

Finally, the existing Protective Order is VACATED.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 1234 [to be codified at 11 U.S.C. § 303]

SEC. 1234. INVOLUNTARY CASES.

(a) AMENDMENTS – Section 303 of title 11, United States Code, is amended –

(1) in subsection (b)(1), by –

(A) inserting 'as to liability or amount' after 'bona fide dispute'; and

(B) striking 'if such claims' and inserting 'if such noncontingent, undisputed claims'; and

(2) in subsection (h)(1), by inserting 'as to liability or amount' before the semicolon at the end.

(b) EFFECTIVE DATE; APPLICATION OF AMENDMENTS – This section and the amendments made by this section shall take effect on the date of the enactment of this Act and shall apply with respect to cases commenced under title 11 of the United States Code before, on, and after such date.

H.R. Rep. No. 109-31, part 1, at 149

Sec. 1234. Involuntary Cases. Section 1234 of the Act amends the Bankruptcy Code's criteria for commencing an involuntary bankruptcy case. Current law renders a creditor ineligible if its claim is contingent as to liability or the subject of a bona fide dispute. This provision amends section 303(b)(1) to specify that a creditor would be ineligible to file an involuntary petition if the creditor's claim was the subject of a bona fide dispute as to liability or amount. It further provides that the claims needed to meet the monetary threshold must be undisputed. The provision makes a conforming revision to section 303(b)(1). Section 1234 becomes effective on the date of enactment of this Act and applies to cases commenced before, on, and after such date.

151 Cong. Rec. E677-78 (daily ed. Apr. 18, 2005)
(Statement of Rep. Royce)

BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005

SPEECH OF
HON. EDWARD R. ROYCE
OF CALIFORNIA
IN THE HOUSE OF REPRESENTATIVES

Thursday, April 14, 2005

Mr. ROYCE, Mr. Speaker, I want to address my remarks to an important provision of S. 256, that is a clarification of Section 303 of the Bankruptcy Code. Section 1234 restates and strengthens Congress' long-standing intent that an involuntary bankruptcy action should not be predicated on disputed claims. Otherwise, opportunistic litigants seeking to gain advantage in contract disputes may improperly employ the leverage of the bankruptcy court.

Because bankruptcy courts should not be used to resolve disputed claims in involuntary cases, the clarification of Section 1234 reemphasizes that a person who disputes the amount of, or liability for, a claim should not be disadvantaged by the stigma and expense of an involuntary bankruptcy proceeding. Put simply, the bankruptcy courts in this nation should now uniformly hold that any claim that is subject to a dispute or litigation, or if it is contested, whether as to the amount of the claim, or as to liability for the claim, that claim cannot be used to commence an involuntary bankruptcy case. This is the bright line that Congress intended to create in 1984 because involuntary bankruptcy carries with it, not only a responsibility, but the

burden on behalf of petitioning creditors to be accurate and certain that their provable claims are qualified by being without dispute as to either liability or amount before commencing an involuntary bankruptcy case. The consequence of bad faith or even sloppy work here is more disastrous than in garden-variety litigation or through the voluntary use of the bankruptcy laws.

It is incomprehensible that an involuntary bankruptcy petition could be based on claims that are inaccurate as to either liability or amount; the injustice that would result from such a filing is so manifest. Despite this manifest injustice of national significance, judges continue to condone the filing of involuntary petitions brought by creditors using disputed claims. For this reason, section 1234 was made a necessary part of this legislation.

There has never been a vote recorded in opposition to this provision because it clearly expresses the unanimous will of Congress; it is the furthest thing from the mind of any Congressman that an involuntary case could be brought on the basis of claims that are disputed. To the contrary, as expressed by this legislation, it has been the will of Congress since 1984 that any claim used to commence an involuntary case must be without dispute.

The bankruptcy courts should not be enjoyed by involuntary petitioning creditors who cannot then prove up claims as to liability or amount. That party should stand in the most accountable legal position. This clarification is necessary because the intent of Congress has been blurred by judicial decisions that go so far as to split disputed claims into "disputed" and "undisputed" parts, or to describe disputes as "potential disputes." These decisions are wrong and the damage they have caused to the

victims of involuntary bankruptcy cases brought using such claims is incalculable. The remedy for such victims rests on an expansive reading of Section 303 (i).

Finally, it is the intent of Congress, as expressed through the unique retroactive application of Section 1234, to require the dismissal of any involuntary petition brought by using disputed claims, including any bankruptcy cases that are pending as a result of the misapplication of Section 303.